

11 USC §1325(a)(3)  
§1325(b)  
Good faith

In re Coburn

Case No. 393-33096-hlh13

11-28-94

The State of Oregon Adult and Family Services Division holds a debt that would be non-dischargeable in chapter 7. The state objected to confirmation on the ground the plan was proposed in bad faith and that the debtor debtors were not contributing all their projected net disposable income. The state argued that the debtor had misrepresented their income in this case and had incurred credit in a prior chapter 13 case without trustee approval.

The court held an evidentiary hearing and ruled that any misrepresentations in the schedules were unintentional and that the debts incurred in the prior case were for necessities including medical treatment that would have been approved if approval had been sought. The court held that the failure to obtain approval was neither intentional nor harmful.

The court reviewed the debtors' expense budget in detail and noted that several of the budgeted expenses were excessive. While the budget was not approved, the court also observed that there was no contention that the debtors intentionally misrepresented their expenses in the budget. Rather, the state contended that the expenses were too high. Thus, the fact that the budget was excessive was not relevant to the good faith inquiry.

The court found that the plan was proposed in good faith but denied confirmation on the ground it failed to contribute all the debtors' net disposable income as required. The court gave the debtors time to file an amended plan in accordance with the court's findings or take other appropriate action.

P94-15(14)

In Re	)	
	)	Case No. 393-33096-H13
JACK S. COBURN	)	
CANDI L. COBURN	)	OPINION
	)	
Debtor(s).	)	

This matter came before the court upon objections to confirmation of the debtors' chapter 13 plan by the State of Oregon, Adult and Family Services Division (creditor). The creditor is represented by Bonnie Canary and the debtors are represented by Caroline Cantrell, both of Portland, Oregon.

The creditor is the holder of an allowed unsecured claim against one of the debtors, Candi Coburn. The plan in this case was confirmed subject to further objections by the creditor. Such objections were timely made and an evidentiary hearing was held on the objections.

The court has reviewed the file and considered the testimony adduced at the evidentiary hearing held on March 15,

1 1994. In sum, the creditor objects to confirmation under  
2 §1325(a)(3) [good faith] and §1325(b) [disposable income  
3 test]. The creditor has asked the court to consider several  
4 factors in assessing the good faith issue.

5 The court does not believe all the factors raised by the  
6 creditor are relevant or useful in determining the good faith  
7 question. These factors will be discussed, however, in the  
8 following section of this opinion in the order and manner  
9 presented in the creditor's proposed findings of fact and  
10 conclusions of law dated April 4, 1994.

11 FINDINGS OF FACT -

12 A. Good faith - The court makes the following findings of  
13 fact on the factors raised by the creditor on the good faith  
14 issue. The usefulness of each factor will also be discussed  
15 where its usefulness is questioned.

16 1. "Amount of proposed payments and the amount of the  
17 debtors' surplus."

18 a. Proposed payments - The debtors' chapter 13 plan  
19 dated June 14, 1993 proposes payments to the chapter 13  
20 trustee of \$481 monthly.

21 b. Debtors' surplus - The amended budget introduced at  
22 the hearing shows an excess of \$330 monthly. Thus, the  
23 debtors propose to pay more to the trustee than their surplus.  
24 It therefore appears that the June 14, 1993 plan is not

1 mathematically feasible and under §1325(a)(6) should not be  
2 confirmed. Even if the debtors proposed a plan that would pay  
3 the trustee only \$330 monthly, the issues raised by the  
4 creditor would still need to be resolved. Since these issues  
5 were fully litigated, the court will dispose of them in this  
6 opinion for the benefit of both parties.

7 At this time, the debtors propose to pay more to the  
8 trustee than their budget shows they can afford. This does  
9 not seem to be an indication of bad faith. If the debtors  
10 budget showed they could pay \$500 monthly to the trustee but  
11 the plan proposed to pay only \$300 monthly, the plan could not  
12 be confirmed because of the requirements of §1325(b)  
13 concerning the contribution of all the debtors' disposable  
14 income. It is not appropriate, however, to consider such an  
15 objection under the "good faith" test of §1325(a)(3). As the  
16 leading bankruptcy treatise has aptly noted:

17 Since Congress has now dealt with the issue quite  
18 specifically in the ability-to-pay provisions, there is no  
19 longer any reason for the amount of a debtor's payments to  
20 be considered as even a part of the good faith standard."  
21 Collier on Bankruptcy, ¶1325.04[3], p. 1325-20 (15th Ed.).

22 The Ninth Circuit Court of Appeals foresaw this  
23 development back in 1982 when it wrote the following in its  
24 opinion in In re Goeb, 675 F.2d 1386 (9th Cir. 1982):

25 In conclusion, we decline to impose a substantial-  
26 repayment requirement because (1) it is contrary to  
27 the language of the statute, (2) whether it would  
28 best further the purposes of the Bankruptcy Code is

1           uncertain, and (3) Congress is aware of the  
2           perceived deficiency in §1325(a). Rather than set  
3           a rigid standard under the guise of interpreting  
4           "good faith," we deem it advisable to apply the law  
5           as written and wait for Congress to create, if it  
6           chooses, further conditions for the confirmation of  
7           Chapter 13 plans." Id. at 1389.

8           This court agrees.

9           2. "Employment history" - Both debtors are employed but both  
10          have experienced periods of unemployment or idleness. For  
11          example, Jack Coburn was unemployed for 7 months during 1992  
12          and Candi Coburn's work as a heavy equipment operator is  
13          seasonal. Their combined income is therefore difficult to  
14          project accurately.

15          The court questions the usefulness of this factor in  
16          determining good faith. If a debtor has had difficulty in  
17          obtaining steady employment, is that some indication of bad  
18          faith in the proposal of a plan? Or, if a debtor with a long  
19          history of continuous employment has recently fallen on hard  
20          times and finds it necessary to file bankruptcy is this  
21          indicative of bad faith? The answer to these two questions is  
22          clearly no.

23          3. "Duration of plan" - The debtor's confirmed plan in this  
24          case was estimated by the chapter 13 trustee to require 46  
25          months to complete in order to pay certain priority claims.

26          Again, one wonders what the use of this factor is in  
27          assessing good faith. Section 1322(c) specifies that a plan

1 may not exceed 36 months in duration except for "cause." This  
2 court has repeatedly held over many years that "cause" to  
3 exceed 3 years must be something for the debtor's benefit.  
4 See, for example, In re Howell, 76 B.R. 793 (Bankr. 1987); In  
5 re Gunn, 37 B.R. 432 (Bankr. 1984); In re Canda, 33 B.R. 75  
6 (Bankr. 1983). If "cause" under §1322(c) were construed to  
7 mean something that would benefit creditors, then all plans  
8 would be required to either pay 100% or to continue for at  
9 least 5 years. Such a construction would render superfluous  
10 the words used by Congress in §1322(c).

11 As a matter of simple logic, one must conclude that a  
12 debtor may propose a plan that exceeds 3 years if he finds  
13 some benefit in doing so but that creditors may not force a  
14 debtor to do so. It is illogical to attempt to find some  
15 indication of bad faith when a debtor fails to exercise an  
16 option granted to him because he perceives no benefit in its  
17 exercise.

18 The rules of statutory construction include the axiom  
19 that specific statutory provisions control over general ones.  
20 In this context, it is inappropriate to ignore the specific  
21 provisions of the statute [here, §1322(c) dealing with plan  
22 duration] by relying on the general provisions of §1325(a) (3)  
23 [good faith]. It is inappropriate for the court to attempt to  
24 alter the drafters' intent in enacting §1322(c) by considering

1       this issue under the guise of the good faith requirement of  
2       §1325(a)(3).

3       4. "Accuracy of plan statements, percentage of repayment,  
4       [sic regarding placement of comma] of unscheduled [sic  
5       regarding use of word "unscheduled" versus "scheduled" or  
6       "unsecured"] debt, attempts to mislead the court."

7           a. Accuracy of plan statements - When counsel for the  
8       creditor uses the term "plan" the court assumes that the  
9       creditor is referring to the "Chapter 13 Plan Dated 6/14/93"  
10      and not some other document filed by the debtors. The  
11      creditor has pointed to no misstatements in the plan and the  
12      court is not aware of any.

13          b. Percentage of repayment of scheduled/unsecured debt -  
14      The percentage repayment of scheduled or unsecured debt is  
15      dependent upon the class of creditors in question. There are  
16      4 classes of creditors in the debtors' plan: Administrative  
17      claimants, creditors holding allowed secured claims, creditors  
18      holding allowed unsecured claims entitled to priority and  
19      creditors holding allowed unsecured claims not entitled to  
20      priority. The allowed administrative and priority claims will  
21      be paid 100% in accordance with paragraphs 2(a) and (c) of the  
22      plan. The allowed secured claims will be paid in full  
23      including interest at 12% per annum according to ¶2(b) the  
24      debtors' plan. The allowed unsecured claims that are not

1 entitled to priority will be paid 0% according to ¶2(d) of the  
2 plan. Thus, 3 of the 4 classes of creditors will be paid in  
3 full.

4 As discussed above, this court agrees with Collier's on  
5 Bankruptcy which notes that, since the amendments to the Code  
6 in 1984 which added the disposable income test of §1325(b),  
7 the dividend to unsecured creditors is no longer an issue  
8 under the good faith requirement.

9 c. Attempts to mislead the court - The court finds that  
10 the debtors' schedules contained inaccuracies and errors that  
11 were not the result of intentional attempts to mislead the  
12 court or creditors. The court is convinced from the testimony  
13 of Candi Coburn that the debtors' were not aware of the  
14 correct amount of their income because of the periods of  
15 unemployment suffered by both debtors.

16 The debtors' failure to obtain approval to incur credit  
17 in their previous chapter 13 case resulted from a lack of  
18 understanding as to their obligations in that regard rather  
19 than an intentional violation of the order of confirmation.  
20 The items purchased were necessary household furniture items  
21 and, given the debtor's testimony, had approval been sought,  
22 it would have been granted.

23 The debtor's decision to incur debt for medical  
24 treatments was also reasonable and necessary and does not

1 indicate an effort to mislead the court. The debtor's  
2 testimony at the hearing before the court and in the  
3 deposition about the children's clothing budget seems mostly  
4 consistent. Any inconsistencies appear to be minor and, in  
5 some cases, the result of statements made in anger or  
6 frustration during the deposition rather than efforts to  
7 mislead. Finally, the debtor's failure to correctly recall  
8 the precise amount of her husband's reinstatement pay does not  
9 seem to the court to be an attempt to mislead but rather an  
10 understandable inability to recall numerical data with  
11 precision.

12 In this regard, the court had the opportunity to view the  
13 witness testify under oath. The court's impression was that  
14 Candi Coburn testified honestly to the best of her ability and  
15 satisfactorily explained the errors in the schedules. Without  
16 reiterating her testimony, it appeared to the court that there  
17 was confusion in everyone's mind about several aspects of the  
18 numerical data, most particularly the earnings of the debtors.  
19 In the court's bankruptcy judicial experience over a 36 year  
20 period, this lack of specific financial information and  
21 knowledge is not uncommon and, in this case, does not amount  
22 to an attempt to mislead the court.

23 5. "Preferential treatment between classes" - The treatment  
24 of the classes of creditors was discussed in #3 above.

1 Section 1322(b)(1) deals with the proper classification of  
2 claims and the appropriateness of discriminating among the  
3 classes. The plan in this case does not violate section  
4 1322(b)(1). As indicated above, it is inappropriate to avoid  
5 the statutory standards for classification imposed under  
6 §1322(b)(1) by imposing some other standard under the good  
7 faith requirements of §1325(a)(3).

8 6. "The extent to which secured debt is modified" - Here, the  
9 creditor does not appear to contend that this test would have  
10 any relevance in this case since the creditor asks that a  
11 finding be made "That secured debt is not modified." If the  
12 plan sought to modify the rights of a holder of an allowed  
13 secured claim, one wonders what relevance this has to the  
14 present inquiry. The Code clearly permits the modification of  
15 secured claims in chapter 13 and other chapters. Why would  
16 one find bad faith in the debtor's actions if he availed  
17 himself of his rights under the Code?

18 This court has repeatedly pointed out in various contexts  
19 that it cannot be an indication of bad faith that one takes  
20 advantage of a law that was passed for his benefit. An apt  
21 example from another field of law is the case of the cash  
22 basis taxpayer who intentionally pays as many deductible  
23 expenses as possible on the last day of a tax year in order to  
24 minimize his tax liability for that year. Surely, no one

1 would contend that such conduct is an unlawful evasion of  
2 taxes, fraudulent, immoral or done in bad faith.

3 It is no more improper for a debtor to propose a chapter  
4 13 plan that contains lawful provisions that will benefit the  
5 debtor than it is for a taxpayer to structure his finances to  
6 minimize his tax obligations.

7 Those who feel it is improper for a debtor to avail  
8 himself of his rights under the Bankruptcy Code should heed  
9 this court's oft-stated advice: "Write to your Congress  
10 person." Courts are not legislative bodies. This author  
11 refuses to intentionally violate his oath of office by  
12 ignoring the U.S. Constitution. A federal judge's duty is to  
13 uphold the United States Constitution and the laws passed  
14 thereunder. Our constitutional government relies on the  
15 checks and balances of the separation of powers doctrine. If  
16 a federal judge ignores the plain intent of Congress, he  
17 engages in judicial legislation. This author has avoided that  
18 temptation for over 3 decades and believes it is his duty to  
19 continue to do so in this case.

20 The proper role of a judge in questions of statutory  
21 construction was well explained by Judge Diarmuid O'Scannlain  
22 in his concurring opinion in the case of In re Beezley, 994 F.  
23 2d 1433 (9th Cir. 1982). In that case, Judge O'Scannlain  
24 wrote:

1           It cannot be overemphasized that we deal here with  
2 matters that are absolutely fundamental to the  
3 integrity of the Bankruptcy Code: the balance  
4 struck between the rights of creditors on the one  
5 hand, and the policy of affording the debtor a  
6 fresh start on the other. How to strike that  
7 balance is an inordinately difficult question - a  
8 question of public policy - as to which reasonable  
9 minds may and quite frequently do differ. Our task  
10 is, perhaps, a relatively easier one, for which we  
11 have only to apply the law as Congress has written  
12 it. What Congress deemed a proper balancing of the  
13 equities between debtor and creditor with respect  
14 to unlisted debts it has enacted in section  
15 523(a)(3) of the Bankruptcy Code. It is not for  
16 the courts to restrike that balance according to  
17 their own lights." Id.

18       7. "Type of debt discharged" - The debt to this creditor  
19 would not be dischargeable in chapter 7 if the creditor filed  
20 a timely and appropriate complaint objecting to the discharge  
21 of this debt. Although many published opinions include this  
22 factor as one indicating bad faith, this court finds this  
23 factor of little help. It is clear from reading §1328(a) and  
24 §523 that certain debts that would be non-dischargeable in  
25 chapter 7 are dischargeable in chapter 13. Thus, as discussed  
26 above, it cannot be an indication of bad faith for a debtor to  
27 take advantage of a law passed for his benefit.

28       This court understands that many creditors do not agree  
29 with the discharge provisions of §1328(a). As mentioned  
30 above, those creditors should do what other groups have done  
31 and seek to have Congress change the law. Several groups have  
32 been successful in convincing Congress to do just that.

1       Witness the additions to the nondischargeable debts added by  
2       amendments to §1328 after it was adopted in 1978.

3       For example, a judgment for certain damages resulting  
4       from the debtor's unlawful operation of a vehicle while  
5       intoxicated is now non-dischargeable (although it is still  
6       possible for a debtor to discharge a judgment for  
7       intentionally committing vehicular homicide). See  
8       §1328(a)(2). Also, it is now much more difficult for a debtor  
9       to discharge an educational debt owed to a governmental unit  
10      even though the debt was incurred by the debtor in an effort  
11      to improve his lot in life (although a debtor can discharge a  
12      claim for embezzlement). See §1328(a)(2).

13      8. "Special circumstances" - The creditor's attorney writes:  
14      "There have been no special circumstances during the course of  
15      the Coburn bankruptcy."

16      9. "The frequency with which debtor has sought relief under  
17      the bankruptcy rules" - The debtors have sought relief under  
18      chapter 13 of the Bankruptcy Code once before. They did not  
19      receive a discharge in their prior case since it was  
20      voluntarily dismissed by the debtors. The reason for the  
21      dismissal was not raised as an issue.

22      It is difficult for the court to make any use of this  
23      fact. The Code specifies in §109(g) the circumstances under  
24      which a debtor is barred from serial filings. The creditor

1 does not contend that §109(g) was violated and this court  
2 declines to speculate as to why the debtors dismissed the  
3 prior case.

4 10. "Motivation and Sincerity of the debtor" - It appears  
5 that the debtors' primary motive is to retain certain assets  
6 and discharge their dischargeable debts under the Bankruptcy  
7 Code. It also appears that the debtors are sincere in this  
8 motive. Since the Bankruptcy Code specifically provides for  
9 retention of assets and a discharge of certain debts in  
10 chapter 13 cases, it is difficult to understand why this  
11 motive is relevant to the good faith inquiry.

12 The creditor's use of "motivation and sincerity" appears  
13 to be merely another way of saying that the debtors have acted  
14 in "bad faith" by attempting to mislead the court or abuse the  
15 bankruptcy process. While this court agrees that such  
16 attempts would constitute bad faith if they occurred, it does  
17 not believe that the rubric "motivation and sincerity" is  
18 particularly helpful. As discussed above, the court finds  
19 that the debtors have not attempted to mislead the court or  
20 abuse the process.

21 The court again agrees with an observation from Collier's  
22 on Bankruptcy:

23 "Only where there has been a showing of  
24 serious debtor misconduct or abuse should  
25 a chapter 13 plan be found lacking in  
26 good faith." Collier on Bankruptcy,

The court cannot make such a finding in this case.

11. "Burden of plan on trustee" - The court finds that this plan will impose the same burden on the standing chapter 13 trustee as all other chapter 13 plans that are confirmed. Specifically, the trustee will monitor the debtor's progress and seek to have the case dismissed if the payments are not made. If the payments are made, the trustee will disburse the funds in accordance with the plan and then file a final account. The trustee has not objected to confirmation of this plan. This court does not see any logical connection between the trustee's duties in administering this routine chapter 13 plan and the debtors' alleged bad faith.

B. Disposable Income - Based on the testimony of the witnesses and the evidence adduced at the hearing, the court makes the following findings of fact on the creditor's objections to the debtors' budget. The court will rely on the figures in the amended schedules I and J from the debtors' hearing exhibit B.

1. The debtors have correctly projected their combined monthly net income as \$3,820 in the amended schedules produced at the hearing.

2. The debtors' budgeted expense of \$1,096 monthly for shelter (rent and utilities) for a family of five people is

1 reasonable.

2 3. The debtors' food budget of \$773 monthly is excessive. A  
3 reasonable sum given the number of people, their ages and  
4 their apparently unusually large size would be \$650 monthly.

5 4. The debtors' clothing and cleaning budget of \$353 is  
6 excessive. A reasonable sum given the factors mentioned in #3  
7 above would be \$200 monthly.

8 5. The debtors' medical expense budget of \$90 monthly is  
9 reasonable.

10 6. The debtors' transportation budget of \$290 is reasonable.

11 7. The debtors' budgeted expenses for recreation including  
12 children's allowances and day care, union dues and school  
13 activities of \$696 is excessive. A reasonable sum would be  
14 \$428. The child care and union dues budget of \$250 and \$34  
15 monthly are reasonable. A \$100 monthly allowance for the  
16 three children is sufficient. This court believes that it is  
17 appropriate for the parents to pay \$44 monthly for the various  
18 sporting and other extra-curricular activities to benefit the  
19 three minor children. The court does not believe that a  
20 chapter 13 debtor must deny his children the privilege of  
21 participating in such activities. It is unfortunate that  
22 public schools can no longer afford to offer such activities  
23 at little or no cost. Further, the debtor testified that some  
24 of the children are unusually talented athletes who may enjoy

1 college scholarships if they are allowed to participate in  
2 these extra-curricular activities. This testimony was not  
3 refuted.

4 8. The debtors' life, auto and renter's monthly insurance  
5 expenses of \$30, \$142 and \$20, respectively are reasonable.

6 After taking these changes into account, it appears the  
7 debtors' monthly expenses total \$2784, leaving disposable  
8 income of \$1036 monthly. If the debtors paid this sum to the  
9 trustee for a period of 36 months as required by §1322(c) and  
10 §1325(b), the total paid into the plan would be \$37,296. The  
11 amount proposed to be paid into the present plan is \$22,126  
12 (\$481 x 46 months). Thus, the court will not confirm the  
13 present plan or any plan that does not propose to pay to the  
14 trustee at least \$37,296 over its life. For example, if an  
15 amended plan were filed which called for monthly payments to  
16 the trustee of \$622 for 60 months, it would meet this  
17 requirement.

#### 18 CONCLUSIONS OF LAW -

19 1. The debtors' plan was proposed in good faith.

20 2. The debtors' plan does not commit all of the disposable  
21 income for a period of 36 months.

22 In summary, while the court does not find that the  
23 debtors' budget is reasonable in all respects, it does not  
24 believe the debtors attempted to mislead anyone in filing the

1 plan or its supporting documents. It is important to note  
2 that there was no evidence that the debtors did not  
3 historically spend the amounts they now claim in their  
4 projections. The issue raised by the creditor was simply  
5 whether the amounts projected in the budget were reasonable.  
6 While an intentionally inflated expense budget or  
7 intentionally deflated income statement would be grounds for  
8 dismissal for cause under §1307, the court does not find that  
9 either occurred in this case. Rather, the income was  
10 difficult to project accurately because of poor record-keeping  
11 and the wife's seasonal employment and the expense items that  
12 were adjusted downward herein were all items that reasonable  
13 people could differ about.

14 The court will enter an order setting aside the order  
15 confirming the plan and granting the debtors 28 days to file  
16 an amended plan in accordance with this opinion.

17 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

18  
19  
20 \_\_\_\_\_  
21 Henry L. Hess, Jr.  
22 Bankruptcy Judge  
23

24 cc: Bonnie Canary  
25 Caroline Cantrell  
26 Robert W. Myers, Trustee